



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: The Bionetics Corporation

File: B-258106

Date: December 9, 1994

Del Stiltner Dameron, Esq., and Thomas F. Burke, Esq.,
McKenna & Cuneo, for the protester.

Terence Murphy, Esq., and Patrick H. O'Donnell, Esq.,
Kaufman & Canoles, for Science and Technology Corporation,
an interested party.

Deidre A. Lee, National Aeronautics and Space
Administration, for the agency.

Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest that agency evaluation of protester's proposal is unreasonable and inconsistent is denied where the agency reasonably concluded that the protester's retirement plan was a strength, but that the specifics of the plan were not sufficiently advantageous to ensure that the protester would be able to hire and retain personnel.

DECISION

The Bionetics Corporation protests the proposed award of a contract to Science and Technology Corporation (STC) under request for proposals (RFP) No. 1-22-0123.1780, issued by the National Aeronautics and Space Administration (NASA) to support public service programs at Langley Research Center. Bionetics asserts that NASA's evaluation of its proposal was unreasonable and that NASA arbitrarily concluded that STC was a responsible contractor.

¹In its protest, Bionetics also asserted that STC failed to complete the Certificate of Procurement Integrity and the Certificate and Disclosure Regarding Payments to Influence Certain Federal Transactions. In its protest report, NASA explained why STC was not required to complete these certificates. Since Bionetics did not address NASA's explanation in its comments on the report, we consider this protest issue abandoned and will not consider it.

(continued...)

We deny the protest in part and dismiss it in part.

According to the RFP, the contractor will be responsible for, among other things, operation of the public mail center and traveling exhibits and preparation of written materials such as the Center newspaper and public relations documents. The RFP stated that the contract would be awarded to the responsible offeror whose proposal was most advantageous to the government, cost and other factors considered. The RFP listed the following four evaluation factors which were of equal importance in the award decision: mission suitability; cost; relevant experience and past performance; and other considerations. Under the mission suitability factor, the following subfactors were listed: (1) phase-in-plan, staffing, and continuing personnel management; (2) total compensation plan; (3) key personnel and organization; and (4) technical operations plan.

Three firms responded to the solicitation. After the proposals were evaluated by a source evaluation committee (SEC), each offeror was requested to respond to questions and submit a best and final offer (BAFO). Following the evaluation of BAFOs, STC's proposal was rated excellent on the mission suitability factor, good on the relevant experience and past performance factor, and good on the other considerations factor.¹ Bionetics's proposal was rated very good on the mission suitability factor, very good on the relevant experience and past performance factor, and good on the other considerations factor. STC's evaluated cost was lower than Bionetics evaluated cost. After completing the evaluation, the SEC presented its results to the source selection official (SSO). The SSO reviewed the results and determined that, based on its higher rating for mission suitability and lower cost, the STC proposal represented the best value to the government.

Bionetics protests that its proposal was unreasonably evaluated by the SEC under two mission suitability subfactors: total compensation plan; and phase-in-plan, staffing, and continuing personnel management.

In reviewing protests against the propriety of an agency evaluation of proposals, it is not the function of our Office to independently evaluate those proposals. Rather, the determination of the relative desirability and technical

¹(...continued)

Communication Network Sys., Inc., B-255158.2, Feb. 8, 1994, 94-1 CPD ¶ 88.

²The ratings used by the SEC were: excellent, very good, good, fair, and poor.

adequacy of the proposals is primarily a matter of agency discretion which we will not disturb unless it is shown to be without a reasonable basis or inconsistent with the evaluation criteria listed in the RFP. Axion Corp., B-252812, July 16, 1993, 93-2 CPD ¶ 28. A protester's disagreement with the agency's evaluation is not itself sufficient to establish that the agency acted arbitrarily. ASR Management & Technical Servs., B-252611, July 15, 1993, 93-2 CPD ¶ 22. Based on our review of the record, we conclude that NASA reasonably evaluated Bionetics's proposal under the total compensation and phase-in-plan subfactors.

The total compensation plan subfactor stated:

"Your proposed Total Compensation Plan (professional and non-professional) will be evaluated regarding the suitability, reasonableness, and equitableness of the proposed compensation structure (both salaries/wages and fringe benefits) to assure that highly qualified personnel are attracted to the effort and their continued interest and employment are likely to occur. Professional and non-professional compensation will also be evaluated to assure that the proposed compensation reflects an understanding of the requirements to be performed."

Under this subfactor, the SEC found that the availability to Bionetics's employees of a 401(k) retirement plan was a strength. However, the SEC also found a major weakness under that subfactor because an employee's interest in employer contributions to the 401(k) plan does not vest for 5 years, and because employer contributions must be approved by the board of directors. Bionetics asserts that it is inconsistent and irrational for the SEC to conclude that Bionetics's 401(k) plan presented both a strength and weakness in its proposal. Bionetics further asserts that it is common for board of directors' approval to be required for employer contributions to 401(k) plans.

We see no inconsistency in NASA's considering in the evaluation both the existence of the 401(k) plan and the actual attributes of the plan, such as the vesting period and the requirement for board of directors' approval for employer contributions. NASA reasonably concluded that the existence of such a plan would generally be an advantage in attracting qualified personnel to the project, but that the specifics of the plan would not be a benefit in attracting and retaining personnel. While Bionetics asserts that it is common to require board of directors' approval for employer contributions to 401(k) plans, this does not establish that it was improper for the agency to consider this feature

in judging the likelihood that the plan would serve to attract and retain qualified personnel. Since Bionetics's proposal merely stated that employer contributions are subject to board of director approval, without any specifics regarding the circumstances under which that approval would be granted or denied, the evaluators could reasonably conclude that a potential employee might prefer not to accept employment with Bionetics because his or her ability to rely on the plan would be limited by the possibility of the board of directors changing its decision regarding employer contributions.

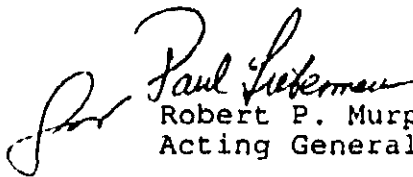
The evaluators also criticized Bionetics's proposal under the phase-in-plan, staffing, and continuing personnel management subfactor. Under that subfactor, the RFP provided that an evaluation would be made regarding the excellence of the proposed plans for initial phase-in, minimizing changeover difficulties, maximizing continuity of services, and maintaining competent staffing during the term of the contract. The RFP provided that, among other things, the evaluators would consider the effectiveness of recruitment and employment methods proposed to staff the contract during the contract term and the effectiveness of programs and policies for minimizing turnover and retaining experienced personnel. Under this subfactor, the SEC listed as a strength Bionetics's proposal of trained, incumbent employees except for one new position, for which the company had already obtained a commitment. As a major weak point, the SEC noted that the 5-year vesting period for employer contributions to the 401(k) plan could hinder employee hiring and retention. Bionetics asserts that it was inconsistent for the agency to conclude that Bionetics both had trained incumbent personnel and would have a problem hiring and retaining employees because of its 401(k) plan. Bionetics reasons that its trained incumbent employees and its commitment from a potential employee to fill the new position reduce or eliminate the need to hire new employees.

We find nothing unreasonable with the agency's evaluation of Bionetics proposal under this subfactor. Bionetics does not argue that it generally would be unreasonable for NASA to find that a potential or current employee might consider a 5-year vesting period for a 401(k) plan to be a negative. Rather, Bionetics simply argues that NASA's conclusion here is unreasonable because it is inconsistent with the finding that Bionetics's trained incumbent employees and commitment for a new position were a strength. However, we think it is reasonable for an agency to consider as a strength that a contractor has trained incumbents in place while also considering that there is a question regarding the ability of that contractor to retain and, if necessary, replace or hire additional employees, based on the benefits the firm is offering.

Finally, Bionetics argues that the contracting officer's finding that STC was a responsible firm was arbitrary and capricious because the contracting officer had before him information that, nine years ago, STC paid a bribe to a Navy employee to influence a procurement in STC's favor, indicating a lack of integrity on the part of STC.

A procuring agency's affirmative determination that a contractor is responsible will not be reviewed by our Office absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not applied. 4 C.F.R. § 21.3(m)(5) (1994); Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62. Here, the record does not evidence, and Bionetics does not assert, that any of these exceptions apply. Accordingly, we will not consider this basis of protest.

The protest is denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel